...IN THE...

Supreme Court

Of the United States.

OCTOBER TERM, 1904.

NO. 112.

Harvey Fullerton,
Plaintiff in Error,

vs.

The State of Texas,
Defendant in Error.

} In Error to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error (defendant below) was informed against, tried, convicted and sentenced to pay a fine of $200 and thirty days' imprisonment in the county jail. The conviction was had under a statue of the state of Texas, which reads as follows:

"If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as agent

or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty."

Penal Code, 1895, *Art.* 377.

A complaint sworn to by one Langford (not a witness in the cause) was filed July 12, 1901, in which it is charged that defendant on or about the 15th day of December, 1900, in the County of Hunt, State of Texas, "did then and there unlawfully conduct, carry on and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products and corporation stocks, and did then and there unlawfully keep a house and manage, conduct, carry on and transact therein a business commonly known as a produce or stock exchange, *and as a bucket shop*, where future contracts were then and there bought and sold with no intention of an actual bona fide delivery of the articles and things so bought and sold, against the peace and dignity of the State."

The information filed on the same day follows the language of the complaint.

A motion filed July 18, 1901, to quash the affidavit and

information was overruled. Under the practice in Texas the cause was tried by the court on July 20th, the defendant having pleaded not guilty and waived a jury. A motion for a new trial was filed and overruled. The judgment was affirmed by the court of criminal appeals, and subsequently a motion for a rehearing was denied. On the 18th day of August, 1903, a writ of error was issued from this court.

It is certified by the Presiding Judge of the Court of Criminal Appeals that on motion for rehearing "the plaintiff in error, in oral argument and in his briefs on said motion, contended and urged before it that under the evidence in the cause plaintiff in error was engaged in interstate commerce and commerce between different states within the meaning of Article 1, Section 8, of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision;" it is further certified that said contention was duly considered by the court and decided adversely to plaintiff in error; and that the court of criminal appeals is the court of final and last resort in the State of Texas in cases of the character of the one in question.

As before stated, the case was tried July 20, 1901, and a statement of facts filed July 27, by which it appears that Fullerton, the defendant, was engaged in business with A. S. Guillot, who was a commission merchant at Ardmore and Greenville, and that Fullerton had charge of the business in Greenville.

As to the manner of conducting the business the de-

fendant Fullerton's own statement is given as a statement of fact, and is substantially as follows:

"The business is conducted in this way: Suppose a man comes in today and wants to buy a 100 bales of cotton for future delivery in New York. He fills out a contract, stating how much he wants to buy, and what month he wishes it delivered, and where he wishes it delivered. I transmit this order by telegraph over our private wire we have to Kansas City, and they transmit to New York. If the man wants to buy New York cotton they transmit it to the New York cotton exchange and secure the cotton for him and report the matter to me from Kansas City—that the purchase has been made covering the order. He does not know, until I notify him through Kansas City, whether the order has been placed or not. Where a man sells a 100 bales of cotton the process is the same. If, before the day of delivery comes around, he does not want to receive—to have a delivery of the cotton he has purchased—he comes to me and orders me to sell it, and I transmit his order by wire. In the transaction of our business I do not actually sell or buy anything, and have never done so. Since I have been here I have never bought or sold anything for future delivery in any Texas market. I don't remember the date when Mr. Sam Beckham bought; it was sometime ago; he bought for July delivery. The draft on Mr. Beckham was for $3,050. It has been paid. I have made other deliveries here. Where a man comes to me and wants me to buy for him a 100 bales of cotton, suppose he has bought it last December for March delivery, and when the day for de-

livery comes around, if he has not made a sale of it, the result is we will deliver the cotton to him, or they noitfy us that they will deliver the cotton. When the contract is entered into for the thing to be bought it is stated where the delivery is to be made, and the delivery will be made there, and can be shipped wherever he wants it to. In giving the orders, when a person wants to buy or sell anything, I telegraph the order to Kansas City, to the Christie Grain and Stock company. I don't, in fact, for myself, or anybody, buy or sell these things. In addition to this character of business, we furnish the market reports to cotton men. Say they want to buy of a farmer a couple of hundred bales of cotton, to be delivered in ten days. They come to us at the time they buy it; they know the market is so much higher, and they come to us and place an order in New York to sell 100 bales of cotton, and they pay us here for the markets so much per month. They pay us this to find out what the market quotations are—that is a part of our business. I receive these reports every time during the day that there is a fluctuation, and I report to the cotton men, who buy cotton, what these quotations are, and in that way they are advised of the state of the market. I report to the grain men and commission men generally—these are the kind of transactions that also take place. * * * We do not buy any futures in this state. Beckham's deal was the same as the rest—he signed the slip, and it was to be delivered when he wanted it delivered. The deal was consumated in Kansas City. I would not transact any business for a man that was not responsible and could not deliver the cotton."

It further appears by the statement of facts that there are exchanges of this kind in every town in Texas the size of Greenville. The party ordering simply instructs the defendant to buy whatever it was that he wanted to buy, and if he wanted to buy a 100 bales of cotton in Decebmer, to be delivered in New York in March, he instructed defendant to buy a 100 bales of cotton on the terms mentioned. The person thus ordering signs a slip for the purchase of the cotton, and defendant then telegraphs to some stock exchange, or somebody, to buy the cotton to cover the amount of his order. It is a fact that the sale of the cotton does not take place until there is a confirmation of the sale by wire from the party to whom defendant wires, announcing the fact that it has been placed. Nothing is actually bought from defendant; he acted as agent; the parties ordering would tell him to buy or sell for them; defendant would do so by telegraphing to someone outside of the state to place that order either to purchase or sell. That was the invariable rule. The defandant was simply paid a commission on whatever he bought or sold for customers; the contract was not consumated until there was an acceptance of it from Kansas City or from any point to which defendant wired. If it was not confirmed there was no purchase or sale. All the slips provide that an actual delivery is expected unless the contract is closed out before delivery day comes around. The following is a copy of the slip referred to. If the order was to sell the word "sell" was used instead of the word "buy:"

COPY OF THE SLIP.

No. ——. Time——.

GREENVILLE, TEXAS, 190—.

Guillot Bros., Commission Merchants.

Please buy for my account and risk, subject to the rules of the exchange.

Article ————

Price ————

To be delivered at ————

During————

Partial payment ————. Closed ————. This order is offered for the acceptance of your correspondents, subject to the conditions on the reverse side, which have been fully noted, and which is hereby fully agreed to. I hereby appoint you as my agent to secure an acceptance of the same.

Signature ————————

NOTICE.

It is assumed that the party giving this order is in every way financially able to complete the contract. It is understood that this order is subject to the acceptance of the correspondents of said Guillot Bros., at Kansas City, at which point all necessary revenue stamps are affixed. It is further understood that said Guillot Bros., are employed as my agents to use their best endeavors to secure an acceptance of this order, and that they are not to be held liable for any wire failure or other unavoidable accident which may prevent satisfactory service. All orders for the sale or purchase of any commodity or articles or securities are received

and executed with the distinct understanding that actual delivery will be insisted upon, and the party giving this order so understands and agrees. Parties giving orders for stocks will indicate when they wish these securities delivered. On grain, provisions and cotton, shipping instructions will be asked for and furnished on settlement day, as provided for by the rules of the exchange where the contracts are placed.

QUESTION INVOLVED.

The question involved is whether the court erred in denying the contention of defendant that he was engaged in interstate commerce, and whether under the statement of facts a conviction was authorized, and both phases of the question are raised and decided by the court under the statement of facts.

ASSIGNMENT OF ERRORS.

The specification of errors relied upon and intended to be urged is as follows:

1. That the judgment and finding of the court is contrary to and in violation of Section 8, Article 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. And the court erred in refusing to find and hold that the acts charged against the defendant as constituting an offense were interstate commerce transactions, and in holding that the statutes of the State of Texas prohibiting transactions of the character alleged in the indictment were valid and

had application to interstate commerce between the several States.

2. The court erred in its finding that the crime and offense charged against the defendant had its venue in and occurred within the jurisdiction of the State of Texas, and in not holding that the transactions in question which are charged to constitute a crime, occurred beyond the limits of the State of Texas and in other States of the Union.

3. The judgment and finding of the court was erroneous because no offense is shown to have been committed in the State of Texas.

ARGUMENT.

I.

We cite again, for the convenience of the court, the provisions of the statute of Texas as embodied in the opinion of the Court of Criminal Appeals in Fullerton vs. State of Texas:

"If any person shall, directly, or through an agent or agents, manage to superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold,

such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty, etc." (Record, p. 29.)

The case itself is not officially reported, but may be found in 75 Southwestern Reporter, 534.

The statute must be construed to charge an offense within the limits of the State of Texas.

In the information the offense is charged as having been committed in the County of Hunt, State of Texas, and it is alleged that the defendant, Fullerton, did then and there unlawfully conduct and carry on a business commonly known as a produce or stock exchange and *as a bucket shop*, where future contracts were then and there bought and sold, with no intention of an actual *bona fide* delivery of the articles and things so bought and sold. (Record, p. 2.)

To give it a construction which would make it apply to transactions completed without the State would be in violation of the provision of the Federal Constitution. This is ruled, in practically a similar case, in *Brennan vs. the City of Titusville*, 153 *U. S.* 289. Brennan was engaged simply in taking orders to be executed outside of the State for parties inside of the State.

So it was held by Judge Hook of the United States Court for the district of Kansas that one Bergen, who was simply taking orders for liquors in the State of Kansas for people in the State of Kansas, to be executed and approved outside of the State, and where such orders were only to become binding when they were approved by a wholesale firm in Missouri, that Bergen had not violated any law of the state

of Kansas, because the law of the State of Kansas could not, and should not be construed to make a party guilty of the violation of that law who was simply engaged in the business of making contracts with citizens outside of the State, subject to their approval, to be shipped within the State, as this is purely a matter of interstate commerce. (Habeas corpus proceedings, in re. Bergen, 115 Fed. 339.)

This very question, however, has also been decided by the Court of Criminal Appeals of Texas in the recent case of Scales vs. State (not officially reported), 81 S. W. 947.

Scales was convicted in the court below under the statute. The judgment was reversed, and it was held that the instructions asked by Scales should have been given, "that what was done by him was not conducting a business for the sale of cotton at Taylor, in Williamson county, but he simply acted as an agent for the parties desiring to sell or purchase cotton, and that the sale was made and consummated in New Orleans or New York, as the case might be."

We are here confronted with a most remarkable condition of affairs. We are not able to reconcile the two cases; each is diametrically opposed to the other. The judgment in the Scales' case was reversed and Scales was discharged; the judgment in the Fullerton case was affirmed, and Fullerton sentenced. In the Scales case the court observes: "Appellant strenuously insists that the facts presented in the record, and almost without controversy, required the court to give the requested instruction."

Varying the phraseology a trifle, we insist that the facts presented in the record in the case at bar required a re-

versal of the judgment and a discharge of Fullerton. The court then occupies two columns in stating appellant's mode of doing business, as follows:

"That a person desiring to purchase cotton for future delivery would come to appellant's office in the city of Taylor, and make request to purchase, say, 100 bales of cotton in the city of New Orleans, for delivery at a future day, at a stated price. That he would take the offer, and telegraph to some member of the Cotton Exchange in New Orleans, and that this broker in New Orleans to whom the order was telegraphed would take the same and go upon the exchange in New Orleans and make the offer to buy the number of bales covered in the order, and if the offer was accepted by any one on the exchange, then the contract would be closed, the broker acting under the instruction sent him by appellant. When the contract was so made, the broker to whom the order had been telegraphed in New Orleans would telegraph acceptance of the same to the firm of Scales & Company, at Taylor; that the order had been executed, and the contract made for the delivery of the cotton. On receipt of this, notification was given to the purchaser at Taylor by appellant; and thereupon said purchaser would pay to the firm of Scales & Co. at Taylor, the sum of $2 per bale, called 'margin,' to cover fluctuations in the market price of cotton. That on every 100 bales of cotton so purchased a commission of $10 was charged by appellant, $5 of which he retained, and the other $5 he sent to the broker empolyed by him in New Orleans. On the payment of this money by the purchaser upon the transaction, the firm of Scales & Co.,

who at all times kept money to their credit with the broker through whom they dealt at New Orleans, would telegraph to the New Orleans broker that the margin of $2 per bale had been paid to them, and to charge their accounts with said sum. That if, at any time, the purchaser desired his cotton to be sold, Scales & Co. would telegraph the broker in New Orleans, who would go upon the exchange and sell the contract, if he could do so, at the price stated. That all of such transactions were real, and not fictitious, and that the broker would make the sale if he could. If consummated he would telegraph back to Scales & Co. that he had sold the contract and the price for which the sale was made, and would notify Scales & Co. that they were credited with the profits, if any had accrued, or, if there was a loss, charge them with the loss. Thereupon Scales & Co. would make a settlement at once, with the party at Taylor, according to the report of the transaction had in New Orleans. In cases where the contracts were made and the money deposited with Scales & Co. for the purchase of cotton, the money was transmitted to New Orleans by telegraph, and there deposited to cover the contract for the party making the same, and all moneys received at New Orleans on account of profits made on such transactions were telegraphed to Taylor, and there paid by Scales to the party to whom it belonged. That Scales & Co. did not receive any part of the money put up as margin, except the commission of $5 on every 100 bales of cotton bought or sold, nor did they retain any part of the money, when the contract was closed out at New Orleans and New York, but the whole of the same

was paid to the person who was the owner of the contract which had been sold.

It is further stated that all these transactions in New Orleans were with the cotton exchange, and the names of the parties with whom he dealt were given, and that all such transactions were real, and not fictitious; that they were all made and agreed to be made and to be governed by the rules and by-laws of said exchange, where they were to be executed, and that, in their making, the understanding was that the rules of the said exchange were that all cotton should be actually delivered upon the contracts in accordance with the terms of the contracts, and all persons were prohibited from making a contract on either of said exchanges in New Orleans or New York relating to the future delivery of cotton which did not contemplate actual and bona fide delivery thereof; that witness had never been informed by any one, nor did he ever know, that it was the intention or purpose of any person making the transaction through the exchange or brokerage business of E. G. Scales & Co. that they did not intend, if they kept their contracts until their maturity, not to accept cotton bought, or actually deliver that sold, in accordance with the terms of the contract; that "said firm never did at any time, in conducting their business at Taylor, in Williamson county, sell any contracts or contract, for the future delivery of cotton, or grain, or produce, or meats, etc., and never did in their business at said point, buy from any person, any future contracts for any such articles, or delivery thereof; that their only business was that of brokers, and that all they did was to accept or-

ders from persons who wished to buy cotton, and telegraph such orders to the different exchanges where the persons desired to have the orders executed, and have them there executed through brokers as hereinbefore explained."

This is a substantial statement of appellant's business, as testified to by him, but we do not understand it to materially vary in any respect from the testimony given by the state's witnesses.

As stated, appellant contends that this was not a sale at all by him in the State of Texas, but he acted merely as the agent of the buyer or purchaser, as the case might be, and the sale was actually consummated through another agent in New Orleans; that what they did was simply to convey the offer to sell or buy to the agent at New Orleans, and the transaction was closed by him. We believe this contention is correct, and, under our statute, it requires, in terms, that the person, in order to be guilty of the offense defined, must conduct or carry on a business where future contracts are bought and sold. Under the authorities, as we understand them, the facts here stated do not show that appellant either bought or sold cotton in the City of Taylor, Williamson County. True, his business was to receive offers for the sale and purchase of cotton. He conveyed these propositions to parties in New Orleans. There the proposition was accepted, the minds of the parties met, and the sale or purchase was made. This, we understand to be the doctrine enunciated by the current of authorities."

(*Citing a large number of authorities.*)

The Court of Criminal Appeals is well fortified. The

facts in the authorities stated are practically the same as in the case at bar, and the several defendants were found not guilty.

Among the authorities cited by the court is State vs. Gritzner, 134 Mo. 512, which is a good illustration of, and supports the contention of appellant. Gritzner was indicted under a statue broader than the statue of Texas for dealing in futures, and the testimony showed that when he received orders in Saline County, Missouri, he transmitted those orders for acceptance to Edwards & Company at Chicago, Illinois, of the following purport: "Buy five wheat or buy five corn," and tended to show that no deliveries were contemplated under these transactions. The court, after holding that the statute must be construed as not intended to create offenses or otherwise regulate the conduct of persons beyond its territorial limits, observes in reference to the facts before it:

'Now, no offense certainly was committed until and unless communication was established between the mind of defandant and the brokers in Chicago to-wit: when the telegram reached that point, because until that juncture no offer to buy or sell, or otherwise agree could have been made. In a word, the case stands here, conceding the reception of the telegram, as if defendant in Slater had spoken to his broker in Chicago over a long distance telephone when, of course, but one opinion would be entertained as to the *locus* where the offer was made, and consequently the crime committed. And it has been ruled in this state, as well as elsewhere, that a person cannot be punished in this State where the of-

fense was actually consummated in another State. *Even though some act constituting a part of the offense, or making the offense possible was committed within this State.* Moreover, as criminal and penal statutes are to be strictly construed, construed strictly, if not *strictissimi juris;* as no one is to made subject to such statutes by implication. As they are non-elastic, as only such transactions are covered by them as are within both their spirit and letter, *as the statute in question does not make it punishable for a citizen of this State to communicate with a citizen of and in another State with a view to deal in options,* it stands to reason as well as to authority, that no such offense as that just mentioned is by the statute created.

See the like effect State vs. Shaeffer, 89 Mo. 271. The Missouri statute under which the Missouri cases were decided reads as follows:

Section 3931, Rev. St. 1889: "Option Dealing Prohibited—Punishment For. All purchases and sales, or contracts, and agreements for the purchase and sale of the shares of the stocks, or bonds, of any corporation, or petroleum, provisions, cotton, grain, or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property, on margins or on optional delivery, when the party selling the same does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, or when the party buying of any of such property or offering

to buy the same, does not intend actually to receive full amount of same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, co-partnership or corporation, or member, officer, or agent thereof, or any persons found guilty of a violation of the provisions of this section shall be fined in a sum not less than three hundred dollars, nor more than three thousand dollars." Section 3932: "What Necessary to Constitute Offense. It shall not be necessary, in order to commit the offense defined in the preceding section, that both the buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, co-partnership, or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership, or persons, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy and sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each offense, be deemed and held to be an accessory thereto, and upon conviction thereof shall be fined the same as the principal; and any such corporation, association, co-partnership or person, or agent, permitting any such communication, reception, exhibit, or display, shall, for every such offense, be fined a sum not less than three hundred dollars nor more than two thousand dollars."

The learned judge who delivered the opinion in the case at bar in the Criminal Court of Appeals, *interalia*, ob-

serves: "The facts show that appellant opened a business in Greenville, where he bought and sold futures in cotton and wheat; that he acted as the agent of the purchasers and sellers; that he had connections East and, perhaps, in Kansas City, with the Christie Bros.; that he was carrying it on for himself and acting as the agent of parties who were buying and selling futures in cotton and wheat and that under his contract the real intent was simply for these parties to speculate in the rise and fall of the prices with no bona fide intention of delivery on the part of the appellant. That the parties purchasing had no intention of expecting a delivery of the cotton under the purchase of the futures and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices—a speculation or bet on the fluctuation of the prices in the article in which they were dealing.

There is nothing in the statement of facts to justify such an interpretation. The court will bear in mind that we are dealing with a *Statement of facts*, and not a statement of evidence. As regards the evidence the court will not only consider the oral evidence as given, but also such inferences as may be legitimately drawn therefrom, but even in this view, there are no inferences that can legitimately be drawn from the statement of facts as evidence only which can properly be said to support the observations of the learned judge delivering the opinion.

The language of the statute itself is somewhat confusing, unless considered as a whole, and then it is sufficiently explained by the use of the words "bucket shop," which it

defines to mean where future contracts are bought and sold with no intention of an actual *bona fide* delivery of the article or thing so bought or sold.

There can be no objections to dealing in futures, unless thus explained. It cannot be questioned that a contract between A and B may be validly made for the sale of certain commodities *to be delivered in the future*, when A has not the commodities at hand, no contract of purchase for them, and when, if called upon by B to deliver, he expects to go into the market and buy them and perform the terms of his contract.

There was nothing bought or sold by the defendant, and no executory contract of sale made by him. There is no conflict in the statement of facts upon this question. The defendant says: "As a matter of fact I did not sell any of those things; I simply placed the orders that were left with me." (Record, p. 19.)

Mr. Guillot says: "We never close the contract over there with the customer ourselves. This business over here itself never bought or sold anything for future delivery; it has made quite a number of actual deliveries upon contracts that were executed through it. (Record, p. 14.) He also defines a bucket shop: "A bucket shop is where the orders are *filled in the office;* it doesn't contemplate delivery. In our business we notify our customers that we will fulfill the contract. We certainly do aim to deliver the stuff." (Record, p. 15.)

We reach the same result if we take the statement of facts as arranged under the names of the witnesses for the

state. Mr. Brown says: "I did not actually buy anything of him. He was acting as agent. I did not sell anything to him. I would tell him to sell or buy for me. I simply instructed to buy or sell for me whatever I wanted, and he did it by telegraphing to someone outside of the state toplace that order either to purchase or sell. That was the invariable rule with me. (Record, 7.) The reason I never had anything delivered to me was because he closed out for me, under my instructions *before the date of the delivery came around.* (Ibid) I recognized that under my contract, which Mr. Fullerton had executed for me, I was entitled to the delivery of the cotton if I wanted it. It would have been delivered to me if I had instructed; instead of doing that, however, I closed the matter up by instructing a sale of it, and he sold it under my instructions." (Record, 8.)

Mr. Pearce says: "As I understand it, all my orders were telegraphed to Kansas City, Mo., and consummated there. I did not actually buy anything of him whatever; he was simply buying and selling for me in the markets—that is the way I understand it." (Record, 10.)

Mr. Williams says: "I recognized that when I bought that cotton, if the contract was finally consummated—if I didn't sell before the date of delivery—it would be delivered to me at the place where I bought on the 25th of that month. The 25th of the delivery month is the day upon wich settlements are made. All these contracts I made either for purchases or sales were consummated in one of the markets outside of this state. I neither bought or sold to defendant in this case anything, future or otherwise, he simply

executed my orders for making these purchases, or sales, in these various markets. That is, they are executed by telegraphing to these markets and the sale or purchase confirmed there. There was no purchase or sale in any instance until the order was telegraphed to the outside markets and executed and sent in. As I said a while ago, many orders failed to be executed where the price was stipulated. It could not be consummated except in the market where it was bought." (Record, 12-13.)

As held in re Bergen, supra—it was shown that Bergen was simply taking orders in the State of Kansas for people in the State of Kansas, to be executed and approved outside of the State, and that such orders only were to become binding when they were approved by the wholesale firm in Missouri; and so are the Missouri cases cited *supra*. The principle controlling is clearly stated in Brennan vs. the City of Titusville, *supra*.

> *Communication by telegraph is interstate commerce, Leloup vs. Port of Mobile, 127 U. S.* 640.

There is no material distinction between the Scales case and the case at bar. It is stated in the Scales case as heretofore quoted: "Under the authorities, as we understand them, the facts here stated do not show that appellant either bought or sold cotton in the City of Taylor, Williamson county. True, his business was to receive offers for the sale and purchase of cotton. He conveyed these propositions to parties in New Orleans. There the proposition was accepted, the minds of the parties met, and the sale or

purchase was made. This, we understand to be the doctrine enunciated by the current of authorities." (Citing a large number of authorities.)

If the statute of Texas is to be construed as covering only offenses within the limits of the State, as is certainly ruled by the authorities, it surely appears that the defendant Fullerton was not guilty of offending against the statute.

The learned judge delivering the opinion in the Court of Criminal Appeals (Rec. pp. 28-30) is equally at fault in saying that under defendant's contract the real intent was simply for the parties to speculate in the rise and fall of prices; that on the part of the parties making the purchase they had no intention of expecting a delivery of the cotton, and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices. (Rec. pp. 29-30.)

There is not a single sentence in the statement of facts which can be tortured into such a meainng. It is held in the Scales case in accordance with the authorities that both parties must understand the agreement to mean that there will be no delivery of the thing sold. The court observes: "We understand the authorities to teach that it is not alone sufficient that one of the parties to the contract contemplates that there will be no delivery of the thing sold, but that both must so understand the agreement. In this respect the burden is on the state to show, before either of the parties to the contract can be convicted, that both parties engaged in a wagering contract." (Citing a large number of authorities.)

It will be remembered that the slip which is signed by the purchaser, or person offering to purchase at a certain price, contains the words: "All orders for the sale or purchase of any commodity or article or securities are received and executed with a distinct understanding that *actual delivery* will be insisted upon, and the party giving this order so understands and agrees." (Rec., 20.)

It is quite unimportant what the offeror says subsequently as to his expectation. The offense, if committed at all, is committed at the time of the signing and acceptance of the slip. The question of intention, we think, is closed by the very terms of the written offer. It cannot be altered or varied by parol; after acceptance it is binding upon both parties. Most of the evidence on the question of a possible intention not to deliver is of a negative character; the absence of knowledge on the part of the witness of any particular case in which delivery was made and is not entitled to consideration. It is reasonable to suppose that a hundred deliveries may have been made without the knowledge of a particular witness as to the particular deliveries. In the statement of facts arranged under the name of the state witness, Mr. Brown, the witness says: "I think that all these slips specify that an actual delivery is expected unless the contract is closed out before delivery day comes around. The reason I have never had anything delivered to me was because he *closed out for me under my instructions before the date of delivery came around.*" (Rec., 7.)

In the Scales case the defendant offered the charters of the New Orleans and New York Exchanges, showing that,

under the charter of these corporations, no one belonging to such exchanges was permitted to make a sale of cotton, etc., unless an actual delivery was contemplated. The evidence was rejected in the court below, but held admissible by the Court of Criminal Appeals. This does not appear in the case at bar, but the further observations of the court are applicable:" But in the absence of such proof, a sale through a corporation would be presumed to be in accordance with the power and method prescribed in the charter of the corporation. What we have said with reference to the charters also applies to the rules and regulations adopted by said exchanges."

Further consideration of the question, we think, is unnecessary, and we conclude by again quoting from the Scales case certain observations which seem pertinent to the case at bar.

Referring to the case then before it (Scales case) the court observes: "In the case at bar, so far as the proof is concerned, the state failed to show that the transaction charged against appellant was a wagering contract. Appellant, on the other hand, assumed the burden and showed that, under the rules of law as laid down by the authorities, what he did, if he could be held to have consummated the contract in Taylor, was not a wagering contract; that is, that the parties in fact intended an actual delivery of the cotton. It may be that the modus operandi here pursued is an evasion of the spirit of the statute in question, but cetrainly the proof does not establish a violation of the letter of our law on the subject."

We respectfully urge that the judgment of the Court of Criminal Appeals of Texas should be reversed, and the defendant discharged.

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